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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 93-184-M
	:	A.C. No. 04-04619-05522-A
v.	:	Docket No. WEST 93-200-M
	:	A.C. No. 04-04619-05523-A
JOHN KEMP & BRAD NICOLAY, employed by AMERICAN RIVER AGGREGATES, Respondents	:	American Aggregates Mine

DECISION

Appearances: J. Phillip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Dana P. Matthews, Esq., DELANEY & BALCOMB, P.C. Glenwood Springs, Colorado, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Respondents with violating Section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.SC. 801, et seq. (the "Act").

Respondents Kemp and Nicolay were the two top management officials at the mine and the individuals who gave work instructions and orders to the miners. (Tr. 22-23).

Section 110(c) of the Act provides as follows:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized,

> ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

The Commission defined the term "knowingly," as used in 110(c) of the Mine Act, as follows:

> "Knowingly" as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means "knowing or having reason to know." A person has reason to know when he has such information as could lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence ... . We believe this interpretation is consistent with both the statutory language and the remedial intent of the Coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute. Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8, 16 (1981) 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983).

In the instant case, Respondents were charged with violating 30 C.F.R. 56.14101(a)(1). The section in its entirety provides as follows:

> (a) Minimum requirements. (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. This standard does not apply to equipment which is not originally equipped with brakes unless the manner in which the equipment is being operated requires the use of brakes for safe operation. This standard does not apply to rail equipment.
>
> (2) If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels.
>
> (3) All braking systems installed on the equipment shall be maintained in functional condition.

> (b) Testing. (1) Service brake tests shall be conducted when an MSHA inspector has reasonable cause to believe that the service brake system does not function as required, unless the mine operator removes the equipment from service from the appropriate repair;
>
> (2) The performance of the service brakes shall be evaluated according to Table M-1.

BACKGROUND

The American River Aggregates Mine is a sand and gravel operation located in Folsom, Sacramento County, California, operated by American River Aggregates, employing 22 miners. Respondent John Kemp is the mine manager, president, and 25 percent owner of the company.

Respondent Brad Nicolay is plant foreman at the mine. At the hearing, it was stipulated that American River Aggregates is a corporation and that each of the Respondents is an agent of the corporate mine operator within the meaning and scope of Section 110(c) of the Mine Act. Further, the Commission has jurisdiction over these proceedings, in that the products of the mine affect interstate commerce. (Tr. 5).

On October 24, 1991, MSHA Inspector Michael Brooks issued a Section 107(a) Order, No. 3911980 to American River Aggregates, citing a violation of 30 C.F.R. 56.14101(a)(1).

The order stated as follows:

> The front-end loader that feeds the main plant did not have service brakes capable of stopping and holding the equipment. The operator would put the loader into gear the opposite direction it was traveling to stop the loader. The loader was working on ground with a slight grade. The operator has been reporting this hazard since July 10, 1991, according to company records. There was mobile traffic moving in the area where the front-end loader was working. These vehicles included commercial trucks and company trucks. With the brakes in this condition, an injury is highly likely to happen and the results are likely to be fatal to the operator or someone who may be in the path of the loader unable to stop. Cat 988 front-end loader Company #L1.

The Caterpillar 988, Company L1, front-end loader, involved in this case, weighs approximately 50,000 or 60,000 pounds. (Tr. 63).

DISCUSSION AND FURTHER FINDINGS

During his inspection on October 24, 1991, Inspector Brooks observed the loader being operated on a slight grade, backing and going into gear quickly in both directions. Mobile truck traffic was moving in the area where the loader was operating. (Tr. 12; Ex. P-2). The Inspector approached the loader operator and asked him how he was stopping the vehicle. His answer was, "By putting the machine in gear of the opposite direction it was traveling because it has no brakes." (Tr. 19).

The loader normally traveled to the dump site over a grade, going up the grade to the top of the pad, and then back down the grade to leave the pad. There was usually truck traffic involving the haul trucks. (Tr. 55, 60-61).

Inspector Brooks asked the loader operator to drive the loader off the hill and to apply the service brakes on the grade. As the operator did this, the service brakes did not hold the loader. At this point, Inspector Brooks shut the loader down. (Tr. 66, 68, 70-71).

Persuasive evidence of defective brakes is the company's daily equipment checklist (Ex. P-3) involving 50 inspections between August 1, 1991, and October 22, 1991. The inspection forms indicated there were essentially "no brakes" on the loader and the machine was described as being unsafe to operate.

In support of their position, Respondents argue that the loader must travel on a grade in order to fall within the prohibition of the regulation. Mr. Nicolay testified the loader was routinely operated on "flat ground" and it could be stopped by using the gears or lowering the bucket. (Tr. 33, 61). Therefore Respondents contend no violation occurred.

I am not persuaded by these arguments. As a threshold matter, Inspector Brooks indicated in MSHA's order that the "loader was working on ground with a slight grade." (Ex. P-2). In any event, the violation here is the failure to have the loader equipped with a "service brake system capable of stopping and holding the equipment." [Section 56.1410(a)(1)]. The typical load on the maximum grade it travels is merely a measure of the efficiency of the braking system. The use of the transmission or the bucket to stop mobile equipment, instead of using service brakes, has been rejected by the Commission in numerous cases, including: Evansville Materials, Inc., 2 FMSHRC 2321, 2326 (Aug. 1980); Mineral Exploration, 6 FMSHRC 316, 321 (Feb. 1984); Brown Brothers Sand Co., 9 FMSHRC 636, 656-657 (March 1987); Missouri

Rock, Inc., 10 FMSHRC 583, 587 (April 1988), aff'd, 11 FMSHRC 136 (Feb. 1989); Brown Brothers Sand Co., 14 FMSHRC 190, 199 (Jan. 1992); Missouri Rock, Inc., 16 FMSHRC 624, 629 (March 1994); and Morris Sand and Gravel, 16 FMSHRC 770, 779 (April 1994).

In Robert Shick, 14 FMSHRC 340, 341 (February 1992) Administrative Law Judge William Fauver stated that "Dropping the bucket to try to stop a front-end loader is not a safe practice."

Respondents further argue the front-end loader could be stopped well within the guidelines mandated by Table M-1 because it would be pushing a 12- to 20-ton load. (Tr. 64). Mr. Nicolay stated that the reversal of gears was in reality a faster method of stopping the loader than using service brakes. (Tr. 65).

These views are a re-argument of service brakes versus transmission or bucket as a stopping method. These arguments are again rejected. Further, 30 C.F.R. 56.14101(2) particularly states: "The performance of the service brakes shall be evaluated according to Table M-1."

Respondents further contend there was no danger to vehicles or individuals by operating the loader in the manner in which it was routinely operated at the time the order was issued.

In connection with this argument, Respondents overlooked the testimony of Inspector Brooks that the condition cited involved imminent danger. It was his opinion, if this condition continued to exist, it was highly likely that a fatal injury could occur. (Tr. 14). I am persuaded by Mr. Brooks' opinion.

Liability of Agents Kemp and Nicolay under Section 110(c)

During his inspection at the mine on October 24, 1991, Inspector Brooks was accompanied by Respondent Brad Nicolay. (Tr. 19). Before citing the subject violation, Inspector Brooks asked Mr. Nicolay if he knew about the brakes being bad on the loader before his (Brooks') inspection. Mr. Nicolay admitted that he knew that the brakes were bad. (Tr. 20-22, 37).

Later on, in his signed interview statement dated May 5, 1992, given to MSHA Special Investigator Michael Turner (Ex. P-4), Respondent Nicolay admitted that he had reviewed the Daily Equipment Checklist on the subject loader (Ex. P-3) prior to October 24, 1991. He also admitted that he knew that the loader needed brakes and that they needed to take care of the problem. (Tr. 34; Ex. 4, pp. 5-6)

When asked when he was first aware of the condition cited in the imminent danger order, Mr. Nicolay replied this occurred about September 24, 1991. (Ex. P-4, p. 7; Tr. 35).

The evidence indicating Respondent Kemp's knowledge of the defective brakes was established in a slightly different manner.

In Mr. Nicolay's statement to MSHA's investigator he stated that Mr. Kemp was aware the brakes were bad and that he (Nicolay) told Kemp that at least once. Although it was known to him, he (Kemp) did not think the brakes were an imminent danger and they could wait another month. (Tr. 35-36; Ex. P-4, p. 8).

Later on, in MSHA's interview statement, Mr. Nicolay was asked the name of the individuals who knew of the conditions described in the imminent danger order, and he responded: "Myself (Nicolay), Mark Bradley (mechanic), John Kemp, and Howard Ahner (the loader operator)" and that "he (Nicolay) had reported the defective brakes to Kemp." (Tr. 38; Ex. P-4, p. 11).

Mr. Kemp testified in these proceedings. He denied having been told by Mr. Ahner (equipment operator) that the brakes were defective. However, no evidence was offered (nor sought in cross-examination) as to what other knowledge he had acquired as to the condition of the brakes.

The direct testimony of Mr. Nicolay establishes that Mr. King was also aware of the defective brakes.

Corporate Liability

The parties stipulated that American River Aggregates, the corporate mine operator, did not contest the imminent danger order or the violation cited. Further, on April 27, 1992, it paid a civil penalty for the underlying violation of 30 C.F.R. 56. 14101(a)(1), pursuant to Section 110(a) of the Mine Act 30 U.S.C. 820(a). (Tr. 39-40).

Abatement

The Section 107(a) Order citing the operator for a violation of 30 C.F.R. 56.14101(a)(1), was abated when the company repaired the service brakes on the loader so they would hold the loader with a typical loaded bucket on the maximum grade it travels. (Tr. 44-45; Ex. P-2). It took about 32 hours for two men to repair the brakes. (Tr. 36).

Based on the record, I conclude the Section 110(c) cases against Respondents John Kemp and Brad Nicolay should be affirmed and civil penalties should be assessed.

Civil Penalties

The penalties in agent cases can be imposed upon a corporate agent under subsection (a) and (d) of Section 110 of the Act. Further, the Commission shall have the authority to assess all

civil penalties under the Act. Section 110(i) set forth the statutory criteria in assessing any penalties.

In the instant cases, there is no adverse history of previous violations. Further, the penalty assessed herein is appropriate and will not affect the agent's ability to continue in business. In addition, I agree with Inspector Brooks that the agents were negligent. Further, the gravity of the violation was serious. Finally, the agents demonstrated good faith in attempting to achieve rapid compliance after notification of the violative condition.

For the above reasons, I enter the following:

ORDER

1. In re West 93-184-M: Secretary of Labor v. John Kemp, employed by American River Aggregates: this 110(c) case is AFFIRMED and a penalty of $600.00 is ASSESSED.

2. In re WEST 93-200-M: Brad Nicolay employed by American River Aggregates: This 110(c) case is AFFIRMED and a penalty of $500.00 is ASSESSED.

John J. Morris
Administrative Law Judge
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